Supreme Court, U.S.
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No. 85-380

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

CAMDEN FIRE INSURANCE ASSOCIATION,

Appellant,

v.

LONNIE JUSTICE,

Appellee.

Appeal from the Supreme Court of Appeals
of West Virginia

MOTION TO DISMISS

G. DAVID BRUMFIELD
First National Bank Building
Drawer P
Welch, West Virginia 24801
(304) 436-3141

Attorney for Appellee

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QUESTIONS PRESENTED

1. Whether a state court decision concerning the application of a state pro cedural rule to a given situation is subject to review by this court, pursuant to 28 U.S.C. § 1257(2).

2. Whether a party who requests a state supreme court not to decide a constitutional issue may thereafter seek to have this Court decide that issue.

3. Whether the claim that a state procedural rule was interpreted by a state court in a "strained and unforeseen manner" presents a substantial federal question.

4. Whether the claim that a state court's interpretation of a state procedural rule should not have been applied retrospectively presents a substantial federal question.

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MOTION TO DISMISS

Appellee Lonnie Justice hereby moves this Court to dismiss the appeal of Appellant Camden Fire Insurance Association or, in the alternative, to treat the appeal as a petition for writ of certiorari and deny the writ.

STATEMENT OF THE CASE

Appellee adopts and incorporates herein the Statement of the Case set forth in Appellant's Jurisdictional Statement with the following addition:

Appellant was represented by counsel at the hearing on damages which was held on May 31, 1983 (App. 79a) [All citations to App. refer to the Appendix to Appellant's Jurisdictional Statement.] Appellant's counsel made opening and closing statements and cross-examined witnesses called by Appellee, but did not present any evidence on behalf of Appellant (App. 80a).

THIS APPEAL SHOULD BE DISMISSED

A. Introductory Statement

This Court will entertain a motion to dismiss an appeal on the ground that the

appeal is not within the Court's jurisdiction, on the ground that it does not present a substantial federal question, or on the ground that the federal question sought to be reviewed was not timely or properly raised below. Sup. Ct. R. 16.1(a) & (b). The present appeal suffers from all three of the foregoing defects. Contrary to Appellant's assertions, the Supreme Court of Appeals of West Virginia ("The Supreme Court of Appeals") did not decide that W. Va. R. Civ. P. 54(c) was constitutionally valid as applied to the facts of this case. Instead, the court decided that Rule 54(c) did not apply to the facts of this case. Such a decision is not subject to review by appeal pursuant to 28 U.S.C. § 1257(2). Moreover, when Appellant petitioned the Supreme Court of Appeals of West Virginia for a rehearing, it specifically requested that the court not

address the possible constitutional implications of its reading of Rule 54(c).

Appellant also complains that the Supreme Court of Appeals arbitrarily interpreted Rule 54(c) and improperly applied that interpretation to the instant case. Neither of these objections goes to the constitutionality of the rule itself. Furthermore, neither objection presents an issue of constitutional dimension which would justify review by this court. Accordingly, this appeal should be dismissed.

B. This Appeal Is Not Within This Court's Jurisdiction

Appellant claims that this Court has jurisdiction to review the decision of the Supreme Court of Appeals pursuant to 28 U.S.C. § 1257(2). This claim is premised on the assertion that the court's decision

upheld the constitutionality of Rule 54(c) of the West Virginia Rules of Civil Procedure as interpreted and applied to Appellant. While Appellee concedes that this Court would have jurisdiction to review such a decision by appeal, it is plain that the decision at issue did not address the constitutional validity of Rule 54(c).

What the Supreme Court of Appeals did decide was that Rule 54(c) does not apply

> where the judgment by default has been rendered as a result of the defaulting party's failure to obey an order of the circuit court to provide or permit discovery under W. Va. R. Civ. P. 37(b) and the defaulting party otherwise appears at the subsequent trial on the issue of damages.

Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127 140 (W. Va. 1985) (App. at 25a) (emphasis by the court). In other words, the court held that Rule 54(c) did not apply to the facts of this case. Such a decision is not subject to review by appeal. Fischer v. Pauline Oil &

Gas Co., 309 U.S. 294 (1940); 12 J. W. Moore, H. Bendix and B. Ringle, Moore's Federal Practice ¶ 513.01 at 8-79 to 8-80 (2d ed. 1982). Judicial determinations regarding whether a statute should apply to a given situation and what effect it should have must be distinguished from decisions concerning the constitutionality of a statute as applied. 12 Moore, Bendix, & Ringle, supra, ¶ 513.01 at 8-80 n.5. The former are not subject to appeal under § 1257(2). Id.

Appellant's own characterization of the opinion of the Supreme Court of Appeals belies its claim that the decision upheld the validity of Rule 54(c). At page eleven (11) of its Jurisdictional Statement, Appellant asserts that the court violated its due process rights by interpreting Rule 54(c) in an arbitrary manner and by retroactively

applying such interpretation to Appellant. Thus, Appellant's real complaint concerns the manner in which the court interpreted Rule 54(c) and the fact that it applied its reading of the rule to the case before it. Such objections, however, are not within this Court's appellate jurisdiction.

C. Appellant Did Not Challenge The Constitutionality of Rule 54(c) Below

It is axiomatic that this Court will not review issues which have not previously been raised or expressly passed on by the court below. See Sup. Ct. Rule 16.1(b). As previously discussed, the opinion of the Supreme Court of Appeals concerned only the scope of Rule 54(c) and its applicability to the facts of the instant case. While Appellant could have sought by means of a petition for rehearing to have the court address the constitutionality of Rule 54(c)

as interpreted in its opinion, thereby preserving the issue for purposes of appeal to this Court, see Missouri v. Gehner, 281 U.S. 313 (1930), it failed to do so. In fact, in its Petition for Rehearing, Appellant disclaimed any intention of asking the Supreme Court of Appeals to decide that issue

> since this Petitioner desires to reserve a possible federal court constitutional due process challenge to this Court's new judicially announced rule, Camden does not specifically request this Court to decide the constitutionality of its own judicially formulated Rule 54(c).

(App. at 134a). Thus, Appellant specifically asked the court below not to consider the issue upon which it now seeks to premise this appeal. Having made this tactical decision, Appellant cannot now change its mind and ask this Court to decide the question.

Appellant apparently recognizes now

that it could not "reserve" this issue for later resolution by a federal court and that it should have raised the matter when petitioning for rehearing (See Jurisdictional Statement at 10, 22). Contrary to Appellant's suggestion, however, it is not guaranteed review of a constitutional issue which it chose not to submit to the Supreme Court of Appeals. To the contrary, Appellant's decision not to submit the issue to the Supreme Court of Appeals is reason to dismiss its appeal.

D. This Appeal Does Not Involve Any Substantial Federal Question

The requirement that a challenge to a state court decision involve a "substantial" federal question is essential to this Court's jurisdiction to review such decision, either by appeal or certiorari. 12 Moore, Bendix & Ringle, supra, ¶ 512.01 at 8-73 to 8-74.

While it is impossible to conclusively define when a federal question is substantial, it is well settled that this requirement is not met if the appellant's position is foreclosed by prior decisions of this Court. Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390, 391 (1952); Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902). Nor does a substantial federal question exist if the appeal involves only issues of state practice and procedure. New York ex rel. Consolidated Water Co. v. Maltbie, 303 U.S. 158, 160 (1938).

As Appellee has already pointed out, the Supreme Court of Appeals merely decided that Rule 54(c) of the West Virginia Rules of Civil Procedure did not preclude Appellee from amending its prayer for punitive damages after the jury had returned its verdict.

Appellant apparently contends that the court's decision in this regard was "so erroneous" as to constitute a denial of due process (See Jurisdictional Statement at 11, 17). Appellant further contends that the court's "retroactive" application of its decision to the case at issue violated its due process rights. Even if Appellant is correct, however, that is, even if the court's reading of Rule 54(c) was erroneous and the court should not have applied its reading of the rule to Appellant, these are not matters of constitutional import which justify review by this Court.

It is well established that this Court will not review a State Court's interpretation of a state statute. Del Castillo v. McConnico, 168 U.S. 674, 689 (1898). The fact that a state court may have misconstrued such a statute does not present

an issue for review by this Court. King v. West Virginia, 216 U.S. 92 (1910). Nor does an erroneous decision as to the meaning of a state statute amount to a denial of due process. Gryger v. Burke, 334 U.S. 728 (1948); Neblett v. Carpenter, 305 U.S. 297, 302 (1938); see also American Railway Express Co. v. Kentucky, 273 U.S. 269, 273 (1927); see also Wood v. Conneaut Lake Park Inc., 386 F.2d 121 (3d Cir. 1967), cert. denied, 391 U.S. 907 (1968).

Appellant argues, however, that the construction given Rule 54(c) in this case amounted to a denial of due process because it was "arbitrary" or so "plainly erroneous" as to be "fundamentally unfair." An examination of the court's opinion, however, indicates that its decision was hardly arbitrary. The court took note of the

"disagreement among commentators and cases" as to how Rule 54(c) ought to be applied. Bell v. Inland Mutual Insurance Co., supra, 332 S.E.2d at 138-39. After examining the two conflicting positions as to the scope of Rule 54(c), the court chose to endorse the position advocated by Appellee and opposed by Appellant.

A decision is arbitrary only if it is without any rational basis or underlying determining principle. United States v. Carmack, 329 U.S. 230, 243 n.14 (1946); Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1, 3-4 (7th Cir. 1974). The basis for the decision below, however, is clear. A defendant who appears, fails to obey a court order and therefore has judgment entered against him is in a fundamentally different position from a defendant who is defaulted without entering an appearance.

The former is entitled to receive notice of all proceedings and to participate fully in the hearing on damages. The latter is not. To distinguish between the two for purposes of applying Rule 54(c) is hardly arbitrary, see 6 J. Moore & J. Lucas, Moore's Federal Practice ¶ 54.61 at 1231-33 (1985), even if this court might disagree with the wisdom of making such a distinction. See Chung v. Park, 514 F.2d 382, 387 (3d Cir.), cert. denied, 423 U.S. 948 (1975) (due process does not guarantee that discretion will be exercised wisely, only that it not be exercised unreasonably or capriciously).

Nor is it "fundamentally unfair" to allow an amendment of the prayer for damages after a hearing on damages at which the defendant is present and entitled to present any relevant evidence which he may have.

Fundamental fairness requires only that a party be given notice and an opportunity to be heard. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971). Appellant does not suggest that it is fundamentally unfair to permit a party who obtains a judgment other than by default to recover all damages to which he is entitled, irrespective of the prayer for relief in his complaint. See 6 J.W. Moore & J. Lucas, supra, ¶ 54.62. A defendant who contests both liability and damages, however, is in the same position in this regard as is a defendant who, by virtue of his failure to comply with a court order, is entitled to present evidence as to damages only. Both defendants are entitled to notice and an evidentiary hearing at which they can contest the amount of their liability. It is difficult to see why permitting a plaintiff to recover all damages to which he is

entitled becomes fundamentally unfair simply because the defendant cannot also contest the fact of liability.

Appellant also asserts that the Supreme Court of Appeals could not as a matter of due process apply its reading of Rule 54(c) to the instant case. It is clear, however, that the Constitution does not prohibit a state court from applying its decisions retrospectively. Linkletter v. Walker, 381 U.S. 618, 629 (1965). This is a question of policy, not constitutional principle:

> We think the Federal Constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward.

Great Northern Railway Co. v. Sunburst Oil &

Refining Co., 287 U.S. 358, 364-65 (1932). Thus, the fact that a judicial decision overrules previously established principles or doctrines upon which a party may have relied does not give rise to a claim under the fourteenth amendment. Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930); see also Central Land Co. of West Virginia v. Laidley, 159 U.S. 103, 112 (1895); Sewell Coal Co. v. Federal Mine Safety & Health Review Commission, 686 F.2d 1066, 1070 (4th Cir. 1982). Accordingly, Appellant's complaint concerning the retrospective application of the decision at issue does not involve a substantial federal question.

II. A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

As discussed above, Appellee contends that this appeal should be dismissed. In the

event that this Court chooses to treat Appellant's filing as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103, however, Appellee submits that the writ should be denied for lack of any substantial federal question.

Appellant's real objection to the decision of the Supreme Court of Appeals is that the court disagreed with Appellant's position as to the scope of Rule 54(c). Appellant's contention that the court erroneously interpreted that rule clearly does not involve any federal question. This Court does not exercise supervisory power over state practice. Milk Wagon Drivers Union of Chicago v. Meadowmoor Dairies, Inc., 312 U.S. 287, 296 (1941). Matters of state court procedure, therefore, are not subject to this Court's review. Central Vermont

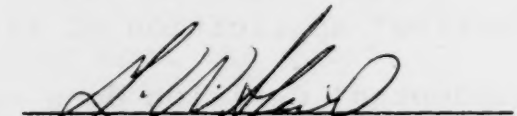
Railway v. White, 238 U.S. 507 (1915).

Nor can Appellant avoid this problem merely by asserting that the court's decision was "so wrong" that it amounted to a violation of due process. Appellant offers no authority for such a proposition, and a fair reading of the opinion at issue reveals that the court certainly had a rational basis for its decision. The Constitution does not require more. Finally, the court's "retroactive" application of this "unprecedented" decision does not raise any constitutional issue. This is a matter of policy to be determined by the state courts. Accordingly, the decision below presents no basis for review by this Court whether by appeal or certiorari.

CONCLUSION

For the foregoing reasons, Appellee requests that this Court dismiss this appeal, or in the alternative, treat Appellant's filing as a petition for writ of certiorari and deny the writ. Appellee also requests that this Court award him his costs and such other and further damages for delay as may be appropriate.

Respectfully submitted



G. David Brumfield
First National Bank Bldg.
Drawer P
Welch, West Virginia 24801
(304) 436-3141

Attorney for Appellee